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NO. 80-1290

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

WILLIAM P. CLEMENTS, JR., Governor of the State of Texas, et al.,

Appellants

VS.

JOHN L. FASHING, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANTS' BRIEF ON THE MERITS

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

JAMES P. ALLISON
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3131

Attorneys for Appellants

QUESTIONS PRESENTED FOR REVIEW

1. Whether Article III, Section 19 and Article XVI, Section 65 of the Texas Constitution violates the First and Fifth Amendments to the United States Constitution?

2. Whether Article III, Section 19 and Article XVI, Section 65 of the Texas Constitution violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

1. John L. Fashing, Jose J. Baca, Walter McGhee, C. Johnny Ybarra, Donovan Webb, Owen Short, Pat Haggerty, William V. Fashing, Loretta Doerr, Arthur Abraham, Sam Snoddy, Bill Eubank, Jim Heathman, Lupe Manago, Juan S. Martinez, Luisa G. Ybarra, Frank Escobar, Phillip E. Bargman, Herbert Ehrlich, Michael T. Milligan, Edward W. Dunbar, Roger L. Moore, C. John Galvan, James L. Lee and George C. Johnston, Plaintiffs-Appellees.

2. Judge T. Udell Moore, Clyde C. Anderson, Richard Telles, Rogelio Sanchez, C.W. "Chuck" Mattox, William Clements, Mark White, George Strake and Mary R. Haynes, Defendants-Appellants

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REFERENCE TO PRIOR DECISIONS

The opinion of the District Court of the United States for the Western District of Texas, Harry Lee Hudspeth, Judge Presiding in Cause No. EP-78-CA-126 entitled "John L. Fashing, et al vs. Judge T. Udell Moore, et al, is found at 489 F. Supp. 471 (W.D. Tex. 1980).

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 80-1107, likewise entitled, is reported at 631 F.2d 731 (1980).

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction of this issue as shown by the following:

1. The statutory provision believed to confer jurisdiction of this appeal in the Supreme Court of the United States is 28 U.S.C. §1254.

2. The judgment of the United States Court of Appeals for the Fifth Circuit as to which review is sought is dated and entered of record on October 31, 1980.

3. Appellants' Notice of Appeal is docketed on January 21, 1981.

4. The Supreme Court of the United States noted probable jurisdiction on June 1, 1981.

STATUTORY PROVISIONS CONSTRUED

The case involves construction of Article XVI, Section 65 of the Texas Constitution and Article III, Section 19 of the Texas Constitution. Both provisions are reproduced in the Jurisdictional Statement and are not again reproduced.

ISSUES ARGUED

ISSUE: The proper standard of Judicial Review to be applied to State Constitutional provisions which restrict candidacy by current officeholders.

ISSUE: Whether there is a rational basis for the Texas Constitutional provisions which restrict candidacy by current officeholders.

ISSUE: Whether appellees have standing to complain of Article III, Section 19 of the Texas Constitution prohibiting candidacy to the legislature during an officeholder's current term of office.

STATEMENT OF THE CASE

This suit was brought by the appellees in the United States District Court for the Western District of Texas seeking to challenge the constitutionality of Article III, Section 19, and Article XVI, Section 65, of the Constitution of the State of Texas. Some of the appellees were public officials who sought to run for higher office without resigning their present office as required by Article XVI, Section 65. The other appellees were voters who were desirous of voting for the officeholder appellees if they sought higher office.

The matter was heard on cross motions for summary judgment in the United States District Court for the Western District of Texas, El Paso division, on January 3, 1980, and the district court issued its judgment, memorandum opinion and order on January 23, 1980. On January 25, 1980, the district court granted the Respondents' request for an injunction. The State Petitioners filed their notice of appeal on February 4, 1980. Oral argument was heard in the United States Court of Appeals for the Fifth Circuit on October 29, 1980. The appellate court issued its opinion on October 31, 1980, which opinion is unpublished and adopts the opinion of the district court.

SUMMARY OF ARGUMENT

The first two issues relate to restrictions imposed upon candidates for public office by the Texas Constitution and the proper scope of judicial review to be accord-

ed such restrictions. The final issue relates to the hypothetical nature of the alleged application of these restrictions to appellees.

A right to candidacy is not a fundamental right. *Bullock v. Carter* 405 U.S. 134 (1972). However the right is a substantial one and requires a Balancing of the rights of the potential candidate with the interests of the state. *U.S. Civil Service Comm. v. Nat'l Assoc. of Letter Carriers* 413 U.S. 548 (1972); *Moriel v. Judiciary Commission of the State of Louisiana* 565 F.2d 295 (SH CR 1977) Article III, Section 19 and Article XVI, Section 65 meet the requirements of this standard by protecting the people of the state from abuse of office and even the appearance of a lack of integrity in its officeholders.

These provisions of the Texas Constitution do create a classification of officeholders, these classifications do not involve "suspect" groups. *Wisconsin v. Yoder* 406 U.S. 205 (1972). The classifictions created (legislative v. non-legislative offices, county level v. state-level offices) are rational and enjoy a presumption of validity. *McGovern v. Maryland* 366 U.S. 420 (1961).

Appellees have raised only a bare hypothetical thrust in attempting to create a controversy, particularly in the case of Article III, Section 19. None of the appellees attempted to seek higher office in violation of the restrictions in these provisions. The allegations before the court sees insufficient to create a case of controversy.

ARGUMENT

The sections of the Texas Constitution which are at issue in this cause provide as follows:

> No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or

> any person holding a lucrative office under the United States, of this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature. TEX.CONST. art. 3, §19.
>
> ...if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State of the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year,such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled. TEX. CONST. art. 16§65.

Two lines of attack have been directed at these provisions by appellees. First, appellees claim that these sections impair their First, Fifth and Fourteenth Amendment fundamental rights to freedom of speech and freedom of association, to seek and hold elective office, and to vote. Second, they claim these sections create constitutionally impermissable classifications in violation of the Equal Protection Clause of the Fourteenth Amendment, the basis for the judgment entered by the courts below.

FIRST AND FIFTH AMENDMENT REVIEW

In considering the application of the fundamental rights protected by the First and Fifth Amendments to Article III, Section 19 and Article XVI, Section 65 of the Texas Constitution, an outline of the restrictions imposed by the state constitutional provisions is helpful.

Article III, Section 19 imposes a prohibition against holders of a lucrative office, such as appellees, becoming candidates for the state legislature before the final year of their four-year term. Article XVI, Section 65 imposes a restriction upon cadidacy by requiring an automatic resignation if certain officeholders, such as appellees, announce as candidates for another office before the final year of their four-year term. Neither of these provisions absolutely preclude candidacy. They preclude or restrict candidacy only prior to the last year of office.

These provisions are deeply rooted in Texas constitutional history. Article III, Section 19 has remained in the Texas Constitution virtually unchanged since 1836. Its origin can be traced to a 1348 petition from the House of Commons to the king "that no person summoned to Parliament should be either a taxer, collector or receiver or the fifteenth then granted." Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis (1978). When the present Texas constitution was drafted in 1876, its framers had witnessed abuses and excesses of power under a strong central state government during the Reconstruction Period. Consequently, they decentralized the state government, required almost all officers to be elected, and restricted their terms of office to two years. Shortly after most terms of office were extended to four years, the people of Texas, in 1958, adopted Article XVI, Section 65, in effect re-imposing a two year term on certain offices if the officeholder attempts to seek other office before the end of his term.

The appellee officeholders have a substantial interest in being free to seek other offices. The state constitutional provisions without question impose a restriction upon that freedom. However, a right to candidacy has never been declared to a fundamental right. *Bullock v. Carter* 405 U.S. 134,143,92 S.Ct. 849, 31 L.Ed.2d. 92

(1972). The impact upon the appellee voters is even less substantial. The impairment of potential voters interests in free expression and political association is not sufficient to warrant the strictest constitutional scrutiny. "Barriers standing in the path of potential candidates" do not automatically invoke the strict scrutiny standard. *Jenness v. Fortson* 403 U.S. 431 (1971).

The standard of review under the First and Fifth Amendments to statutes restricting candidacy is "in a state of flux and...reconciling the plethora of cases in this field is near to impossible." *Morial v. Judiciary Commission of the State of Louisiana*, 565 F.2d 295,308 (5th Cir. 1977, Judge Fay dissenting). However, *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548,93 S.Ct. 2880, 37 L.Ed.2d 966 (1972) and *Morial, supra.* have outlined a process of evaluation for this case.

In *Letter Carriers* the court considered prohibitions upon political activities of federal employees imposed by the Hatch Act. These prohibitions included no formal positions in political parties, no substantial roles in partisan political campaigns, and no candidacy for office on partisan political tickets. The Court recognized the government's interest in regulating the conduct of its employees, and citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) stated: "'The problem in any case is to arrive at a balance between the interests of the [employee] as a citizen in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees.' Although Congress is free to strike a different balance than it has, if it so choosed, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations...." *U.S. Civil*

Commission v. National Association of Letter Carriers, supra at 564.

The Court outlined the important interests of the government which justified these restrictions upon First and Fifth Amendment privileges. Among these were 1) employees of the executive branch should administer the law in accordance with the will of the legislative branch, 2) the laws should be executed without bias or favoritism, and 3) the government and its employees should avoid even the appearance of political justice. *Id.* at 564-565.

In *Moriel, supra,,* the U. S. Court of Appeals for the Fifth Circuit, *en banc,* considered the constitutionality of the "resign-to-run" rule embodied in the Louisiana Code of Judicial Ethics. In evaluating the restriction exerted upon First Amendment expressions by the "resign-to-run" rule, the Court articulated the following standard: ". . . restrictions on the partisan political activity of public employees and officers, where such activity contains substantial non-speech elements are constitutionally permissible if justified by a reasonable necessity to burden those activities to achieve a compelling public objective." [Citations omitted] *Id,* at 300. Based upon an analysis of the interests of the officeholder and the interests of the state, the provision was upheld.

The interests of the state which created "a reasonable necessity" in *Moriel* were 1) preventing abuse of office by a judge-candidate during a campaign, 2) preventing abuse of office by a losing judge-candidate who returned to the bench, 3) eliminating even the appearance of impropriety by judges both during and after the campaign.

The same important interests served by the Hatch Act restrictions upheld in *Letter Carriers* and the Louisiana "resign-to-run" rule upheld im *Moriel* are served

by Article III, Section 19 and Article XVI, Section 65, of the Texas Constitution. Article III, Section 19 insures that executive and administrative officers perform their duties faithfully and enforce the statutes and policies of the legislative branch without the temptation of frustrating those policies to improve their chances in a legislative contest during their term of office. If an unsuccessful legislative candidate were allowed to return to administrative duties, the likelihood that he would be less than diligent in executing the policies of the legislature is considerable. Likewise, Article XVI, Section 65 prevents abuse in office by candidates, prevents post-election abuse of office by losing candidates and prevents the appearance of impropriety in the election process.

The district court in its memorandum and order below, adopted by the U.S. Court of Appeals for the Fifth Circuit, did not hold that Article III, Section 19 or Article XVI, Section 65 unconstitutionally infringe upon First and Fifth Amendment rights, relying instead upon equal protection considerations. J.A. 15, 16. Indeed, the court agreed that Article XVI, Section 65 served "legitimate state interests." J.A. 15. Although the district court observed, in *dicta*, that the Texas restrictions are applied to a broader group of officeholders, these provisions are certainly more limited in scope and application than the Hatch Act which covers almost all federal employees.

Other cases have also addressed the issues herein. The federal resign-to-run rule was declared unconstitutional because, unlike Article XVI, Section 65, it effectively denied a certain council member *any* opportunity to run for mayor of the District of Columbia without resignation. *Barry v. Dist. of Columbia Board of Elections* 448 F.Supp. 1249 (1978), app.dismissed. 580 F2d 695 (1978). Even in *Barry* the court recognized that

its holding deviated from the precedents in this area and intimated that the result might have been different had the D.C. provisions had the weight of historical continuity behind them. "In *Letter Carriers, Broadrick, Morial* and *Magill* the court found impairments similar to those here to be outweighed by the countervailing governmental interests advanced by the challenged statute. Those cases involved statutory provisions of long standing and widespread acceptance, both of which naturally suggest strong, rational, and legitimate governmental interests." Id. at 10.

The United States District Court for the Middle District of Pennsylvania recently upheld a resign-to-run rule similar to Article XVI, Section 65. *Adams v. Supreme Court of Penn.* 502 F.Supp. 1282 (M.D. Pa. 1980). That court adopted a balancing standard, rather than the compelling state interest approach utilized by the lower court in this case. Other cases have also upheld resign-to-run provisions in Florida and New York. *Stack v. Adams,* 315 F.Supp. 1295 (N.D. Fl. 1970);*Signorelliv. Evans* 637 F.2d 853 (2nd Cir. 1980).

EQUAL PROTECTION CLAUSE

Appellees' second attack upon Article III, Section 19 and Article XVI, Section 65 is based upon an allegation that these provisions create constitutionally impermissible classifications in violation of the Equal Protection Clause of the Fourteenth Amendment. This allegation was the basis of the lower courts' judgment. J.A. 11-17.

Without question these Texas Constitutional provisions do create classification of officeholders. However, such a determination does not render them constitutionally infirm. This Court has traditionally applied a

deference to the determinations of legislative bodies, and, in this instance, the people of the state; also it has not required legislation to cure all ills at one time. *Railway Express Agency v. New York,* 336 U.S. 106 (1949). These provisions make no distinction on the basis of "suspect" groups such as race, color or religion; therefore, the "strict scrutiny" standard is not applicable. *Wisconsin v. Yoder,* 406 U.S. 205 (1972). These state constitutional sections should be accorded a presumption of validity and the burden of proof was upon the Appellees to establish no rational basis for these classifications. *McGowan v. Maryland,* 366 U.S. 420 (1961). In the alternative, the standard should be whether these classifications are reasonably necessary for the protection of the interests of the state. *Moriel,* supra. at 304. Under either standard, Article III, Section 19, and Article XVI, Section 65, have ample justification ad support.

Article III, Section 19, is a part of the legislative article of the Texas Constitution. It forms an integral part of a comprehensive separation of powers doctrine. The trial court found offensive the fact that no reciprocal prohibition is placed upon a legislator seeking executive or judicial positions. (J.A. 16) This overlooks the provisions of Article III, Section 18 which provide, in part "No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office of profit under this State which shall have been created, or the emoluments of which may have been increased, during such term, or (2) any office or place, the appointment to which may be made in whole or in part, by either branch of the Legislature . . . ." These provisions serve as a check against potential abuse of office by legislators even as Article III, Section 19 prevents abuse by other officeholders.

A reciprocal prohibition is not required by the U.S. Constitution. The proper standard for determining an

equal protection challenge to Article III, Section 19, is whether the classification bears a rational relationship to the state interest being protected. *Foley v. Connelie,* 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978).

To apply this test, we must first examine the classification established. It includes all elected state officials, including members of the legislature, all elected county officials, some, but not all, elected city officials, and officials of some other political subdivisions. State law establishes compensation for the state and county officials, while, for city officers, compensation is strictly at the option of the municipality. Most, but not all, other political subdivisions lack authority to pay their elected officials. Excluded from the classification are officials elected and appointed to nonlucrative positions. If the state has some rational justification for this scheme of classification, then the classification must be sustained against an equal protection attack.

It is undeniable that legislative office is of a character different from the administrative and judicial offices of the state or its subdivisions. The basic function of the legislature is to set policy. The function of officials in the other branches, to the contrary, is to administer the policies established by the legislature. It is clearly inimical to the American form of government, the basic concept of separation of powers, to permit an official with administrative duties to serve in the legislative body. This is also prohibited by the Tex. Const. Art. II §1 and Art. XVI §40.

The state could properly pick this alternative (absolute ineligibility), rather than some other restriction (e.g., a resign-to-run rule) because this goal also promoted other important state interests. For example, a prospective legislative candidacy by an adminstrative

official brings great pressure on that individual to compromise duty for the sake of political expendiency. Likewise, a candidate "feeling the water" even before he has "thrown his hat into the ring" has his attention diverted from his administrative duties while trying to decide whether to make the race. Texas' solution, to make such individuals ineligible to the legislature, deals with these problems as well.

Texas has chosen not to disqualify from eligibility to the legislature only those who hold non-lucrative office. All state and county officers hold lucrative offices. In the case of other local governmental bodies, the state has rationally assumed that, if the political subdivision found it necessary to compensate its officials, it was because the job was of sufficient import that it involved some substantial expenditure of time and effort in fulfilling the policies established by the legislature. On the other hand, positions which could be handled on a "volunteer" basis would not involve administrative discretion of a sufficient nature that the penalties of Art. III §19 were required.

Commencing our analysis of Art. XVI, Section 65 and its alleged conflict with the equal protection clause, we must first analyze the role that counties play in the overall scheme of government in Texas. Counties, are "created . . . for the convenience of the people and for purposes of local government, but for the exercise of essentially state powers as distinguished from municipal powers; and, with their conferred powers having the nature of duties rather than of privilege, existing as but agencies of the State for the effective discharge through local officers of the governmental obligations of the State." *Bexar County v. Linden,* 110 Tex. 339, 340, 220 S.W. 761, 761 (1920). They are distinguished from cities and other special purpose districts in that such districts exist primarily for local purposes, while the

county exists primarily as an agency of the State. It is therefore natural that the state constitution should differentiate between officers of the county and officers of other subdivisions. The offices covered by Art. XVI §65 all function at the county level. All county-level elected officials are covered. In addition, district attorneys are included as the primary prosecutor at the county level. These officers are not under any direct supervision by a higher state official and need the restrictions found in Article XVI, Section 65 to prevent abuse of office. In Article XVI, Section 65, there is one basic classification. County-level officials are treated differently from state level officials. This differentiation is justified.

Texas' basic policy calls for elections of local officials every two years. Art. XVI §30 Tex. Const. The reason for this policy is that frequent elections were felt to make government more responsive to the people. Art. XVI §65 is in derogation of this policy, and as such the provisions of the last paragraph thereof (the "resign-to-run" rule) are reasonably designed to substitute for that policy, in that a county-level officeholder at least could not abuse his office while he sought another office. The county-level offices are often the initial positions held by budding politicians. Since these offices are often stepping-stones, the temptation to seek higher office while safely occupying a county position is great. The people of Texas have guarded their state government from such abuse through Article XVI, Section 65.

With state officials, the situation is different. State officials fall into three categories. First, state administrative officers who hold the highest non-judicial elective offices in the state. This group would include the Governor, Lieutenant Governor, Attorney General, State Treasurer, Comptroller of Public Accounts, Commissioner of the General Land Office, Commissioner of

Agriculture, and Railroad Commissioners. With one exception, these officials are elected to four year terms all of which run concurrently. The three railroad commissioners are elected to 6 year terms, with one being elected every two years. The state can reasonably conclude that these office holders are so unlikely to seek another office that a resign-to-run rule is unnecessary for them. As a practical matter the only two offices these officials are likely to seek are U.S. Senate, and, possibly, the Presidency. Since four year terms were instituted for these officials in 1974, none has sought a different office in his mid-term.

The second group of state level officials not found with a "resign-to-run" rule are judicial officers, members of the Supreme Court, Court of Criminal Appeals, and the 14 Courts of Appeals (formerly Courts of Civil Appeals). In all cases, these judges are on appellate courts with three or more members. The absense of one judge during a campaign would not cripple the court's abililty to function during that period, since a quarom would still be present. Again, while there is some possibility of one of these officials seeking a different office at his mid-term, it is not great, and it is not fatal to the court system in any case since the court can hear a case even in the absence of one judge.

The third group of state-level officials not covered by resign-to-run rules are legislators. With them, the need for such a rule evaporates entirely. The legislature can, and normally does, function normally in the absence of some members, so that candidacy for another office cannot interfere with the legislature disposing of its business. Furthermore, the Texas legislature's regular sessions run only 140 days every two years, so that the chances of the legislature being in session during a mid-term campaign are neglible. Finally, 150 of the 181 members serve terms of two years; whenever they wish

to run for another state or county office, their term would be expiring anyway.

The trial court posed two questions in support of its holding that there is no reasonable basis for the classification of offices in Article XVI, Section 65: "Can a classification be upheld which allows a municipal court judge (not covered by Section 65) to run for district judge without resigning his office, while a justice of the peace (covered by Section 65) cannot? How can a rule be justified which permits a district judge to run for the Court of Civil Appeals without vacating his office, while a county court-at-law judge may not do so?" (J.A. 15) These questions were obviously posed rhetorically in an attempt to assign absurd results to Article XVI, Section 65. Even if their conclusions were completely accurate, these two instances would not justify the destruction of the entire resign-to-run plan. However, the conclusion in the first question is incorrect. If a municipal court judge is elected for a four year term, his situation, under Article XI, Section 11 of the Texas Constitution will be identical to that of a justice of the peace under Article XVI, Section 65. He must resign to run in the middle of his term. The second question concerns the differences between a county-level office (county court-at-law) and a state-level office (district judge) discussed previously. In addition there are many constitutional and statutory differences between the duties, jurisdiction, and qualifications of district judges and county court-at-law judges.

STANDING

Appellees assert that they are harmed because they will not announce their candidacy for various offices in future elections because of the provisions of Art. XVI §65, Tex.Const. In addition, Appellee Baca alleges that he will not become a candidate for District Judge, the State Legislature, or the United States Congress

because of the automatic resignation provisions of Art. XVI, Section 65 and because he is ineligible for the legislature under Art. III, Section 19. There are no other allegations regarding Art. III, Section 19.

The District Court, citing *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) for the proposition that "actual conduct which would invoke the operation of the sections under attack is not a prerequisite to challenging their validity"; (J.A. 13) ruled that Appellee's allegations, viewed in conjunction with the summary judgment proofs were sufficient to establish subject matter jurisdiction and standing. Such ruling was erroneous.

> "When the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Regional Rail Reorganization Act Cases*, 469 U.S. 102, 143, 95 S.Ct. 335, 358, 42 L.Ed.2d 320, 352 (1974).

The key phrase here is patent inevitability, for if operation of the challenged provision against an individual is hypothetical the case does not present a cognizable controversy. *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). *Steffel v. Thompson supra*, and other cases involving criminal prosecutions are not governed by this rule, since almost all criminal prosecutions are discretionary. *Regional Rail Reorganization Act Cases, supra* at 143 n.29, 45 S.Ct. at 358, 42 L.Ed.2d at 353. In other words, since the operation of a criminal statute against a violator is always contingent upon the prosecution bringing charges, a person may attack such a statute prior to its violation, and without showing that enforcement of the statute

against the person is inevitable. With respect to a civil statute, however, it must be inevitable that the allegedly unconstitutional provision will operate against a person before he has standing to attack the statute. This inevitability is not present in this case. Appellees have it within their power to create a case or controversy in this cause by filing to seek other offices at the mid-point of their terms. They could have done so in the past, and may yet do so in the future, but until they do, their claims are not cognizable in the courts.

Even if this Court should choose to disregard the distinction drawn in the *Regional Rail Reorganization Act Cases, supra,* and rule that mere allegations of a desire to come into future conflict with an alledgedly unconstitutional provision is sufficient to give rise to a case or controversy in civil as well as criminal cases, Appellees allegations are insufficient to make his Art. III, Section 19 claims cognizable. Appellees have alleged only that one of them *might* choose to run for one of several offices, including, *inter alia,* the state legislature. The court's power to pass on the constitutionality of a provision of the Texas Constitution ". . . arises only when the interest of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." *United Public Workers v. Mitchell,* supra at 89, 67 S.Ct. at 524, 91 L.Ed. at 767. Appellees allegations of hypothetical wrongs which might occur only if he, at some time in the future, elects to pursue one of numerous possible paths, do not constitute a sufficient basis to establish a case or controversy. *Warth v. Seldin* 422 U.S. 590, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

CONCLUSION

For the reasons shown herein, the judgment of the court below should be reversed.

Respectfully submitted

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

JAMES P. ALLISON
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3131

Attorneys for Appellants

CERTIFICATE OF SERVICE

I, James P. Allison, Assistant Attorney General of the State of Texas, do hereby certify that a true and correct copy of the foregoing Brief of Appellants has been served on all parties by placing same in the U.S. mail, certified, return receipt requested, to Mr. Raymond C. Caballero, Attorney for Appellees, 521 Texas Avenue, El Paso, Texas 79901, on the 14th day of August, 1981.

James P. Allison
Assistant Attorney General
Bar No. 01090000
P. O. Box 12548
Austin, Texas 78711